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MAIL DATE
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Decision 95-10-032 October 18, 1995

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's Own Motion Into Mobile Telephone Service and Wireless Communications.	))))	I.93-12-007 (Filed December 7, 1993)

I N D E X

O P I N I O N

I. Background

By this decision, we resolve some outstanding issues concerning the extent of our remaining jurisdiction over commercial mobile radio service (CMRS) providers in recognition of changes in federal law under the Omnibus Budget Reconciliation Act of 1993 (Budget Act) signed into law on August 10, 1993. CMRS include cellular services, personal communication services (PCS), wide-area specialized mobile radio services (SMR), and radiotelephone utilities (RTU or paging) services.

Among the provisions of the Budget Act were two which affect the regulatory treatment of CMRS providers. One of these provisions generally removed rate regulation for all CMRS providers effective August 10, 1994, but left in place the states' authority to regulate "other terms and conditions" of service. The second provision preempts states from regulating market entry of all CMRS providers. (See 47 U.S.C. § 332(c)(3) as amended by the Budget Act.) [1]

As authorized under the Budget Act, the Commission filed a petition with the Federal Communications Commission (FCC) (Petition) on August 8, 1994, to continue its rate jurisdiction

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1 Section 332(c)(3)(A) of the Communications Act as amended by the 1993 Budget Act, states that:

> "...no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile service."

over cellular carriers for an 18-month period. On May 19, 1995, in the Matter of the Petition of the People of the State of California and the Public Utilities Commission of the State of California to Retain Authority to Regulate Intrastate Cellular Service Rates, the FCC released its Report and Order denying the petition. On June 8, 1995, the Commission issued a news release stating it had decided not to appeal the FCC denial. The Cellular Resellers Association (CRA) sought reconsideration of the FCC denial, on June 22, 1995. (See page 9 of CRA Response to Emergency Request to Stay D.94-08-022, et seq.) On August 8, 1995, the FCC released its Order on Reconsideration in which it denied CRA's petition for reconsideration.

In Decision (D.) 94-10-031 and D.94-12-042, we established interim procedures to respond to the Budget Act's provisions concerning state jurisdiction over rate and entry regulation for CMRS providers, pending further examination of how existing regulatory requirements should be modified in recognition of that legislation. We continue to consider these issues as we work to resolve the tangled legal web of California and federal law concerning regulation of rates and to set appropriate regulatory policies that reflect this new reality.

The jurisdictional question concerning which of our rules have been affected by federal preemption of our regulation of market entry by CMRS providers is also a central issue in this proceeding. By assigned Commissioner ruling (ACR) dated February 3, 1995, in this proceeding, comments were requested from interested parties addressing the scope of Commission jurisdiction over the siting of facilities and transfer or encumbrance of assets and transfer of control. Responsive comments were filed on February 21, 1995.

Parties' comments have been duly reviewed and taken into account, as appropriate, in reaching a resolution of these matters. By today's decision, we clarify the nature, scope, and extent of

our exercise of our remaining jurisdiction over CMRS providers in recognition of the Budget Act's provisions concerning state entry regulation. Our jurisdiction over CMRS facilities siting, and asset transfers or encumbrances, ownership transfers, and security issuances is addressed herein.

II. CMRS Providers Subject to Commission Jurisdiction

An initial issue to resolve is what categories of wireless carriers are subject to our jurisdiction under the provisions of the Budget Act. In particular, we must determine whether we have jurisdiction over SMR providers at this time. Traditionally, the FCC classified land mobile radio services into two categories: private and public commercial carriers. SMR providers were previously classified as private carriers. Private carriers traditionally provided communications service tailored to the needs of specific groups such as local governments or public safety organizations. Private radio service was not subject to common carrier (public utility) regulation at either the federal or state level.

In recent years, however, FCC actions enabling SMR licensees to offer service to a broad customer base with only minimal restrictions created the prospect for direct competition between "private" and "public" carriers. Therefore, under the Budget Act, certain carriers previously classified as "private" were reclassified as "commercial" in the interests of promoting uniformity in the regulation of all commercially competitive

wireless carriers.[2] The reclassified carriers included wide-area SMR licensees, such as Nextel Communications (Nextel), who offer interconnected service to customers.

Nextel holds the view that SMR providers do not become subject to any jurisdictional oversight by this Commission until August 10, 1996, the end of the three-year transition period provided by the Budget Act. We agree that Nextel does not become subject to this Commission's jurisdiction until that date. Section 6002(c)(2)(B) of the Budget Act provides that:

> "any private land mobile service provided by any person before [the] date of enactment [of the Budget Act], and any paging service utilizing frequencies allocated as of January 1, 1993 for private land mobile services, shall, except for purposes [relating to foreign ownership], be treated as a private mobile service until 3 years after such date of enactment."

Nextel was providing private land mobile service prior to the date of enactment of the Budget Act, and therefore is entitled to continued treatment as a private mobile service until three years after the enactment of the Budget Act, i.e., until August 10, 1996. This Commission has never regulated private mobile services. Accordingly, Nextel will not become subject to any Commission regulation until August 10, 1996, when it will cease being treated as a private mobile service. On that date, it will become subject to the same state regulatory scheme as is then in effect for other

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2 Commercial carriers, as defined in the Budget Act involve "any mobile service...that is provided for profit and makes interconnected service available" to the public. (See 47 U.S.C. 332(d)(i) as added by Sec. 6002(b) of the Budget Act.)

The House Report on the Budget Act states that the purpose of this amendment is "to provide ... that equivalent mobile services are regulated in the same manner." (House Report No. 103-111 at p. 259, reprinted in 1993 U.S.C.C.& A.N. at p. 575.)

CMRS carriers. This is consistent with the Congressional intent to allow carriers being reclassified from private mobile service to CMRS status a three-year transition period before they become subject to the degree of regulation applicable to CMRS providers. (See House Report No. 103-111, at pp. 260, 262, reprinted in 1993 U.S.C.C.& A.N. at pp. 587, 589.)

PCS carriers, on the other hand, generally have never been classified as private land mobile service providers. Accordingly, PCS carriers are generally not entitled to the three-year transition period authorized by Sec. 6002(c)(2)(B), and are therefore generally subject to the provisions of this order, the same as other CMRS providers.

Due to the passage of recent legislation (AB 202) Chapter 357, 1995 statutes, we must also address our jurisdiction over one-way paging services. Chapter 357 amends Public Utilities (PU) code § 234 to exempt from public utility status "[a]ny one-way paging service utilizing facilities that are licensed by the FCC, including, but not limited to, narrow-band personal communications services described in subpart D (commencing with Section 24.100) of Part 24 of Title 47 of the Code of Federal Regulations, as in effect on June 13, 1995." This law becomes effective on January 1, 1996. Accordingly, from and after that date, we will no longer have any jurisdiction over one-way paging service utilizing facilities licensed by the FCC.[3]

3 Chapter 357 designates the director of the Department of Consumer Affairs to receive consumer complaints concerning these one-way paging services beginning January 1, 1996.

III. Jurisdiction Over Property and Securities Transactions, and Facilities Siting

As noted previously, President Fessler issued an ACR on February 3, 1995, addressing two related issues involving Commission jurisdiction over CMRS carriers in light of the federal preemption over regulation of market entry. The ACR raised the issue of whether the Commission is barred from exercising jurisdiction over CMRS providers' facilities siting, and also whether the Commission retains jurisdiction over the transfer or encumbrance of CMRS providers' assets or the transfer of ownership. The ACR solicited parties' comments on these issues.

The parties agree with the ACR's premise that the transfer of ownership of a CMRS entity under PU Code § 854 is tantamount to entry, and that Commission jurisdiction over such transfers is preempted under federal legislation. Parties generally believe, however, that the ACR proposal does not go far enough, but that the Commission should completely withdraw from regulation of facilities siting and any asset transfers or encumbrances as well as transfers of ownership.

A. Position of Cellular Carriers

Cellular carriers argue that the Commission should find that all ownership transfers, asset transfer or encumbrance transactions within the scope of §§ 851-854 constitute market entry and are not subject to state jurisdiction. McCaw, for example, disagrees with the ACR's distinction between § 854 transfers of ownership control as constituting entry and §§ 851-853 acquisitions or encumbrances of property as constituting terms and conditions subject to Commission jurisdiction. McCaw argues that such a distinction does not resolve any public interest concerns and creates confusion as to which sales, mergers, or acquisitions of utility property are subject to Commission approval. McCaw states

that the Commission has declined to articulate a clear rule for determining when a transaction is a transfer of control subject to § 854. Absent a clear objective standard, McCaw believes that it will be difficult for a CMRS provider to determine when a transaction is significant enough to require Commission approval under § 854. McCaw proposes that this confusion be avoided by a clear statement that all transactions subject to §§ 851-854 constitute market entry and are no longer subject to Commission jurisdiction.

AirTouch focused its comments on the issue of Commission jurisdiction over CMRS facilities siting. AirTouch believes that the current siting requirements imposed on cellular carriers by GO 159 are burdensome, confusing, and wasteful of resources without any discernible public benefit. AirTouch argues that Commission involvement in the siting of cellular facilities merely duplicates the review afforded by local governmental authorities and is unnecessary. In any event, AirTouch believes the Commission's treatment of cell siting should apply equally to all CMRS providers.

B. Position of Cellular Resellers

Cellular Resellers Association believe that all nondominant CMRS carriers, including cellular resellers, should be subject to the same exemption from §§ 851-854 as currently applies to nondominant long distance carriers. In contrast, CRA believes that dominant carriers, such as facilities-based cellular carriers, should remain subject to the fitness and public interest requirements of § 854, as noted in the ACR.

C. Position of RTUs

The position of RTUs is that the Commission's preemption of entry under the Budget Act means that the Commission has no authority for prior approval of the siting of new facilities by RTUs in California. Even assuming the Commission's jurisdiction over transfers and encumbrances of utility property were not

preempted, the RTUs believe the Commission should forebear, as it currently does, from exercising such authority with respect to any relevant transactions involving RTUs.

The RTUs acknowledge that some distinction can be drawn between facilities added in new service areas and facilities added within an existing service area. They claim, however, that the Commission has never required prior approval of RTU sites installed within existing service territories (i.e., "fill-in sites") pursuant to Rule 18(o) of the Commission's Rules of Practice and Procedure. While existing Commission rules require prior approval of RTU facilities when an RTU plans to expand into a new market area, the RTUs argue that such prior approval constitutes regulation of entry. Since the Budget Act preempts the Commission from regulating entry, the RTUs argue for the elimination of any preapproval requirements for the addition of RTU facilities coincident with service territory expansion. Metrocall of Delaware (Metrocall) states that fill-in sites typically involve little more than the placement of an antenna on existing facilities, installations involving no material environmental concerns. Metrocall believes RTU fill-in sites are adequately reviewed by local authorities and have given rise to no serious controversies in the past.

As a means to assist the Commission in ascertaining the location of facilities for service-related issues and to continue its responsibilities under the California Environmental Quality Act (CEQA), AirTouch Paging proposes that noncellular CMRS providers could be required to provide quarterly reports showing all new facilities added to their system. The report would not be in the current tariff format, but in a format to be determined by the carrier, and including site location, Call Sign, and frequency.

With respect to the question of the Budget Act's preemption of jurisdiction over transfers or encumbrances of utility property, the RTUs claim that the issue has been rendered

moot, and that the Commission has already exempted RTUs from the provision of § 851. (See 25 CPUC2d 459, 462.)

D. Position of SMR and PCS Providers

Nextel filed comments asserting that it will become subject to the jurisdiction of this Commission with respect to matters other than rates and entry after August 10, 1996. Nextel argues that the Commission must only assert its regulatory powers where market conditions or peculiar and distinct problems actually require such jurisdiction to be exercised. Based upon its experience as a SMR provider, Nextel believes there are no market conditions, nor any distinct problems, that necessitate Commission exercise of jurisdiction over facilities siting by CMRS providers, absent a wireless carrier's request that it do so.

Nextel recommends that the Commission limit its exercise of jurisdiction over siting only to resolving disputes between wireless carriers and local governmental authorities or any concerned persons which cannot be resolved by negotiation between such parties. Since some California cities purport to forbid, categorically, the placement of wireless communications facilities within their boundaries, such cities could cause wireless communications systems to have "holes" in their coverage area, according to Nextel. Nextel believes the Commission could play a useful role in such cases by offering a forum for the resolution of such disputes where necessary. Accordingly, Nextel proposes that the Commission forbear from exercising its jurisdiction over siting except where requested to do so by a wireless carrier. Nextel's approach would place the siting of CMRS facilities on "autopilot" to the maximum extent possible, while allowing this Commission to step in and exercise jurisdiction on a case-by-case basis whenever so requested by a wireless carrier.

Nextel supports the ACR's stated intention not to regulate transfers of ownership of a CMRS provider on the basis that such transfers are tantamount to market entry, which is

preempted. Nextel proposes, however, that the Commission exempt all CMRS providers from having to comply with all provisions of §§ 816-830 and 851-856 of the PU Code relating to transfer or encumbrance of CMRS assets even when "market entry or exit" is not involved. Nextel finds it incongruous that the Commission would not regulate transactions involving entry of a completely new and possibly inexperienced provider into the market, but would regulate every minor transaction involving a sale or encumbrance of assets. Based on its assessment of the growing competitiveness of the CMRS marketplace, Nextel believes that regulation of transfers and encumbrances of assets is unnecessary, and that the discipline of the marketplace will be adequate to protect service quality.

Pacific Bell Mobile Services (PBMS), a wireless PCS subsidiary of Pacific Bell, states that the technology for PCS requires the placing of as many as one thousand base stations for just one California MTA license. Whatever role the Commission undertakes, it must consider the potential drain on Commission resources, as well as the need to facilitate new services to compete with entrenched cellular providers, according to PBMS.

PBMS and Pacific Telesis Mobile Services jointly filed a motion on June 19, 1995 for an order that any Commission approval of the financing transactions for its PCS Network are preempted by the FCC. PBMS argues that Commission review and approval of PCS financing transactions constitutes regulation of "entry" and requests prompt resolution of this question to facilitate finalization of its financing plans.

E. Discussion

Before we engage in deciding the extent of our remaining jurisdiction, we will address how far we may go in light of article 3, section 3.5 of the California Constitution. This section provides, in pertinent part, that:

> An administrative agency, including an administration agency created by the

> Constitution ... has no power ... [t]o declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulation.

Under this constitutional provision we cannot declare the requirements of any California statute unenforceable due to federal preemption. However, we can declare that a state statute is not preempted by federal law. We also can declare that requirements imposed only by Commission decisions (and not mandated by statute) are unenforceable due to federal preemption.

In light of this discussion, we must, at the outset, correct our order contained in D.94-10-031, as modified by D.94-12-042. With these decisions we implemented the federal preemption of entry regulation of CMRS carriers by eliminating the requirement for Certificates of Public Convenience and Necessity (CPCNs) for noncellular CMRS providers. The federal regulatory scheme contemplates that the FCC will grant licenses to CMRS carriers without any further discretionary state approval being required for market entry; therefore, we adopted a simplified procedure for filing a Wireless Identification Registration. However, PU Code § 1001 requires a telephone corporation to obtain a CPCN from this Commission before establishing a new or expanded service territory, subject to certain exceptions. As explained above, we lack the authority to declare § 1001, or any other portion of the PU Code, unenforceable. Accordingly, we will establish new procedures that will not eliminate the statutory requirement, but instead attempt to harmonize our enforcement of § 1001 with the new federal regulatory framework.

We believe, as we have stated in earlier decisions, that the public interest will be served by the rapid development of

competition in the CMRS field. Accordingly, we find that the public convenience and necessity will require market entry of all CMRS providers licensed by the FCC. Based on this finding, the issuance of CPCN, where required by § 1001, becomes a ministerial act. Accordingly, we will direct the Executive Director, or the Director's delegee, to promptly issue a CPCN to any CMRS provider that does not have one, and has made the initial Wireless Registration Identification filing required by D.94-10-031. For facilities-based providers, we shall require them to also provide the Commission with a copy of their FCC license.

There are two separate issues to be resolved in addressing the extent of continued regulatory involvement over CMRS facilities siting, security issuances, and transfers or encumbrances of assets or transfers of ownership. First, we must define what rules and market functions remain within our jurisdiction. Secondly, for those remaining rules and functions for which we retain jurisdiction, we must determine whether it is appropriate to forbear from regulating in the interests of promoting a more competitive market and more streamlined regulation.

(1) Stock and Security Issuances/Ownership and Asset Transfers or Encumbrances

Article 5 (Sections 816-830) of the PU Code generally addresses the requirements for Commission approval of public utilities' issuances of securities.[4] Article 6,

4 Section 816 authorizes the Commission to supervise and regulate public utilities' power to issue stocks, bonds, and other securities, or to create liens on utility property within the state. Section 817 prescribes the purposes for which stocks, bonds, and other securities can be issued. Sections 818-825 generally prescribe the manner and form of Commission authorization

(Footnote continues on next page)

(Sections 851-856) of the PU Code generally requires a California public utility to obtain Commission authorization before disposing of or encumbering its utility system or transferring certain ownership interests in the utility.[5]

As stated above, our jurisdiction over all aspects of regulation of one-way paging services terminates effective January 1, 1996 due to the passage of AB 202 (Chapter 357, 1995 statutes). Accordingly, the applicability of the following discussion regarding Articles 5 and 6 to one-way paging services is limited to the period up to January 1, 1996. Thereafter, the

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(Footnote continued from previous page)
which must be obtained before a utility may issue stocks, bonds, or engage in other securities transactions. Sections 826-827 discuss sanctions for noncompliance with these code provisions. Section 828 indicates that the State is not liable for payment resulting from any securities transactions of a public utility. Section 829 provides for the conditions under which the Commission may grant exemptions from compliance with the provisions of this article. Finally, § 830 requires public utilities to obtain a Commission authorization before assuming any liability as guarantor, surety, or otherwise.

5 Section 851 requires Commission authorization before a public utility may sell, lease, assign, mortgage, or otherwise dispose or encumber all or any part of its utility system which is necessary or useful in performing its duties to the public. Section 852 requires Commission authorization of utility acquisitions of capital stock of another utility. Section 853 provides for the Commission to grant exemption from compliance with this article where consistent with the public interest. Section 854 requires CPUC approval of acquisitions of control and prescribes criteria for approval of certain mergers and corporate acquisitions. Section 855 does not apply to CMRS. Section 856 prescribes sanctions for noncompliance with the article.

policies we adopt below with respect to CMRS providers shall no longer apply to one-way paging services.

While the Budget Act, itself, does not explicitly define what activities constitute "entry," the legislative history does provide helpful examples that indicate what activities are subject to continued state jurisdiction. The legislative history of the Budget Act explicitly includes transfers of ownership as an example of "other terms and conditions" over which states still retain the authority to regulate. (House Report No. 103-111, at 261.) Indeed, in its denial of the petition of the Public Utilities Commission of Ohio to regulate cellular rates, the FCC stated: "Further, the Committee's list of "other terms and conditions" explicitly contemplates review by states of contractual arrangements relating to 'transfers of control.'" [6] In the same manner, other transfers or encumbrances of assets which do not involve a change in ownership of a CMRS provider's system continue to be under our jurisdiction. The transactions covered by Articles 5 and 6 of the PU Code are closely related. The transfer or encumbrance of utility property under Article 6 may likely be linked with financing transactions of the sort covered in Article 5.

Although most parties, if not all, argue against regulation of any transfers and encumbrances of property, they rely more on practical rather than legal considerations. Parties' arguments fail to establish that preemption of entry regulation forecloses state jurisdiction over any transaction under Articles 5 and 6. Where property transfers or securities transactions described under Articles 5 and 6 are made in the ongoing course of

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[6] Report and Order at 24, In the Matter of Petition of the State of Ohio for Authority to Continue to Regulate Commercial Mobile Radio Services, PR Docket No. 94-109.

business with no change in service territory boundaries, there is no basis to conclude that regulation of such transactions would have anything to do with entry. Clearly the regulation of such transactions is not preempted. Yet, even where a new market entrant needs to secure financing for initial start up operations through issuing securities or encumbering property, such financing transactions do not, in themselves, constitute entry into the market. The construction or acquisition of plant and equipment and the financing thereof involve questions of how service is to be rendered, not whether a CMRS entity may enter a given market. Accordingly, there is no preemption of such transactions on the theory that market entry is being regulated. We conclude that regulation of securities transactions and transfers of ownership of a CMRS entity as prescribed in Articles 5 and 6 is not tantamount to market entry regulation and, thus, is not preempted by the Budget Act.

While transactions involving asset transfer or encumbrance and security issuances still fall within our jurisdiction, however, we must resolve whether public policy considerations warrant our forbearance from active regulation, aside from questions of preemption. We agree with the comments of various parties that it would be wasteful of resources and could inhibit the growth of competition to impose more restrictive requirements on CMRS providers than is necessary to discharge our responsibilities to protect the public interest. The Commission is authorized to exempt individual utilities or classes of utilities from these requirements pursuant to the parallel provisions of §§ 829 and 853 of the PU Code. Section 829 provides in pertinent part that:

> "The commission from time to time by order or rule, and subject to such terms and conditions as may be prescribed therein, exempt any public utility or class of public utility from the provisions of this article [Article 5, Secs. 816-830] if it finds that the application

> thereof to such public utility or class of public utility is not necessary in the public interest."

We have previously allowed both cellular resellers and RTUs exemption from §§ 816-830 (regarding securities transactions) and from the requirement of obtaining Commission authority to transfer legal title to, or otherwise encumber, properties to which § 851 applies, when such transfer or encumbrance serves to secure debt. In D.87-10-035 (A.84-03-092), we granted the request of Crico Telecommunications, a RTU, for an order extending to RTUs the exemptions and expedited procedures provided to nondominant telecommunications carriers. We stated in that decision:

> "In a series of decisions in A.84-03-002...the Commission ultimately ruled that nondominant telecommunications carriers should be exempt (1) from Article V (Sec.816-830) in its entirety and (2) from the requirement of obtaining Commission authority to transfer legal title to, other otherwise encumber, properties to which Section 851 applies, when such transfer or encumbrance serves to secure debt....While D.86-08-057 did not completely exempt nondominant telecommunications carriers from Article VI (Sect. 851-855), the Order did authorize the Executive Director to grant noncontroversial applications by such carriers for authority to transfer assets or control under Sections 851-855...
>
> "The exemptions provided to nondominant telecommunications carriers by the decisions in A.84-03-092 have been extended to resellers of cellular telephone services. While no generic proceeding was held with respect to cellular resellers, the Commission has routinely and consistently extended the benefits of D.86-08-057 to cellular resellers." (See 25 CPUC2d 459, 462.)

In that decision, we extended these exemptions to RTUs with respect to the requirements of Articles 5 and 6 of Chapter 4 of the PU Code. By today's decision, with the exception of the

three specific categories of transactions described below,[7] we shall further extend the existing exemptions to cover all CMRS carriers, including facilities-based cellular carriers, and to cover all of the provisions of both Articles 5 (Sec. 816-830) and 6 (Sec. 851-855).

Accordingly, we shall forbear from requiring preapproval of transactions involving issuances of stock and other securities as well as transfers of ownership and acquisition or encumbrances of CMRS property except, again, those discussed below. For exempted transactions, we shall not require CMRS carriers to seek authorization through the Executive Director of the Commission, but shall require carriers to make an informational filing under our Wireless Registration procedures reporting any changes in ownership interests of a CMRS entity within five days of the execution of such changes. We shall relieve all CMRS providers from the requirement to file an application or advice letter for authority to execute such exempt transactions which would otherwise be required under §§ 816-830 and 851-856. If any such applications and advice letters are now pending before us, they shall be dismissed. This uniform exemption should further streamline our regulation and promote competition.

(a) Motion for Declaratory Relief by Pacific Bell Mobil Services and Pacific Telesis Mobil Services

Notwithstanding carriers' general opposition to active Commission regulation of CMRS financing transactions, certain parties have raised concerns over the applicability of Commission

7 These three categories are: (1) the financing of a CMRS affiliate by a facilities-based LEC or a facilities-based interexchange carrier (IEC) (or their affiliates), (2) an ownership interest in a CMRS entity being acquired by a facilities-based LEC or facilities-based IEC (or their affiliates) and (3) an ownership transfer where a controlling interest is acquired.

jurisdiction with respect to financing transactions involving relationships between a wireline local exchange carrier and its wireless affiliate.

These concerns were raised in the context of the motion filed on June 19, 1995 by Pacific Bell Mobile Services (PBMS) and Pacific Telesis Mobile Services (PTMS) for an order that any Commission approvals for its PCS network are preempted by the Budget Act. Pacific Telesis Group formed PTMS and PBMS, following the spinoff of PacTel Corporation (now AirTouch), to develop a PCS network in California. To facilitate the financing of its PCS network and to remove uncertainty as to the need for Commission preapproval of any financing vehicles, PBMS seeks a Commission ruling stating that financing transactions are conditions precedent to entry and are therefore preempted under the Budget Act.

Responses in opposition to the motion were filed by AirTouch, MCI, LACTC, and CCAC. Parties generally argue that the motion requires the Commission to gather additional information regarding the nature of the proposed financing to assure that no harm comes to ratepayers or to the competitive marketplace. AirTouch provided some of the most extensive comments on the motion. AirTouch states that Pacific has structured its PCS business in a manner which enables Pacific to leverage LEC utility assets for operation of its PCS subsidiary. AirTouch contends that competitors will be placed at a significant disadvantage if PBMS utilizes Pacific Bell's existing landline network, marketing channels, captive customer base, and other resources for operation of its PCS subsidiary while denying competitors equal access to those resources. AirTouch requests that the Commission defer ruling on the Motion and institute an investigation to determine the relationship among the Pacific Telesis Group affiliates, the impact of the relationship on the CMRS marketplace, and the adequacy of affiliate transaction rules to protect ratepayers.

A third-round pleading was filed on July 28, 1995 by PBMS in response to the AirTouch response. PBMS also attached a motion for acceptance of its third-round pleading. PBMS argues that it should be allowed to respond to the AirTouch response which went beyond comment on the issue raised in the PBMS motion and effectively contains a separate motion.

We shall accept the PBMS third-round pleading because it provides information relevant to resolving the parties' dispute and addresses the AirTouch proposal for the Commission to institute a separate investigation. PBMS opposes AirTouch's proposal that an investigation be instituted regarding the impact on the CMRS marketplace of the relationship among the Pacific Telesis Group affiliates, and the adequacy of the affiliate transaction rules to protect ratepayers.

Since we have concluded above that we retain jurisdiction over CMRS financing transactions, the PBMS motion is denied insofar as it seeks an order finding that we are preempted with respect to such transactions. We agree with PBMS, however, that no good cause has been shown to justify instituting a formal investigation into the Pacific Telesis affiliates, as requested by AirTouch. On July 1, 1994, Pacific filed Advice Letter No. 17025 to reflect a revenue reduction for expenses related to early development work for PCS which was incorporated in Pacific's retail rates. In its supplemental Advice Letter No. 17025(B) regarding its PCS service, Pacific requested Commission confirmation that affiliate transaction rules apply to transactions between PBMS, Pacific Bell, and other affiliates. By Resolution T-15627 dated October 26, 1994, the Commission confirmed that existing affiliate transaction rules are adequate.

> As stated in Resolution T-15627:
> "The [affiliate transaction rules] were created to cover situations where utilities provide services to unregulated entities in which the utility had some financial interest, exactly the case expected for PCS. The affiliate rules

should not need to be revised to fit each new service, and we will make no amendment to the rules here."

PBMS is bound by those rules with respect to affiliate activities involving its PCS network. AirTouch has provided no basis to conclude that this issue should be revisited or that circumstances have changed since our resolution was issued. Accordingly, we reject AirTouch's request for a separate formal investigation on affiliate transactions.

(b) Advance Notice to CACD Required of Certain Proposed CMRS Transactions

Apropos a general policy, we shall not require CMRS carriers to notify CACD in advance of any proposed CMRS transactions except those transactions involving either (1) the financing of a CMRS affiliate by a facilities-based LEC[8] or a facilities-based interexchange carrier (IEC) (or their affiliates), (2) an ownership interest in a CMRS entity being acquired by a facilities-based LEC or facilities-based IEC (or their affiliates) or (3) where transfer of ownership control of a CMRS entity is contemplated. For purposes of this last provision, a transfer of ownership control would occur if an existing or prospective owner or group of owners acquired a larger ownership share than the largest holding of any current owner. We choose to maintain some oversight over the first two types because we wish to ensure that captive ratepayers are protected until intra- and inter-LATA competition develops further. As to the third type of transaction, we wish to retain the ability to ensure that the participants in an ownership transfer have complied fully with our rules and regulations.

8 The term "facilities-based LEC" is defined in the rules for local exchange competition adopted in R.94-04-043.

For those transactions described in (1) above, the CMRS provider shall notify CACD 14 days in advance of the proposed transaction. For transactions described in (2) and (3) above, the CMRS provider shall notify CACD 30 days in advance of the proposed transaction. Following notification, the Commission staff will have the specified number of days to advise the CMRS provider that further information or a formal application is required. Absent such action by the Commission or its staff, the CMRS provider will not need to seek Commission pre-approval.

Our decision to grant exemptions for transactions under Articles 5 and 6 of the PU Code may be revisited if any security issuances, asset transfers, encumbrances, or ownership transfers that may be adverse to the public interest come to light.

(2) Facilities Siting

Under § 1001 of the PU Code, California public utilities generally must obtain a Certificate of Public Convenience and Necessity (CPCN) to begin construction of system facilities or to expand into new service territories. Rule 18 of the Commission's Rules of Practice and Procedure specifies the required contents of an application for a CPCN. We must consider whether, or to what extent, the federal preemption over market entry regulation affects our requirements for CPCNs for facilities siting by CMRS providers who are initiating service within California or expanding their existing California service territories.

Even prior to entry preemption our rules placed limits on the circumstances under which RTUs needed to file applications for CPCNs for the addition of facilities. It is not our intent to impose any additional requirements for preapproval of facilities.

However, we disagree with the RTUs' claim that the Commission no longer has any legal jurisdiction over the siting of RTU facilities. We continue to believe that the siting of facilities within a given market area is related to, but distinct from, entry or exit from a given market. As described in Rule

18(o)(6), for example, a utility may construct "fill-in" facilities which do not change service territory boundaries. There is no regulation of entry involved in--and thus no preemption of--oversight of such "fill-in" facilities. Even where expansion into a new service territory is involved, we still have jurisdiction over the siting of facilities. The issue of facilities siting involves the question of where and how facilities should be located, not whether a CMRS provider should be allowed to enter a given market. The nature and extent of facilities constructed coincident with the service expansion may affect the quality of service offered. Our continued jurisdiction over siting authority is consistent with the Legislative history of the Budget Act which expressly references "facilities siting issues" such as zoning as a term and condition reserved to the States (House Report No. 103-111 at 261).

As noted above, CPCN's are required pursuant to Section 1001 of the Public Utilities Code, while our Rules of Practice and Procedure specify the required contents of an application for a CPCN. As explained earlier in this decision, while we can declare that procedural requirements to obtain a CPCN imposed only by our own regulations are unenforceable due to federal preemption, under article 3, section 3.5 of the California Constitution, we cannot declare the requirements of PU Code § 1001 unenforceable due to federal preemption.

Accordingly, we will prospectively exempt all CMRS carriers from the requirement to file an application or advice letter for a CPCN for new construction as prescribed under Rule 18. As we are not free to declare section 1001 unenforceable, we will attempt to harmonize our enforcement of that section with the new federal regulatory framework. Section 1001, subject to certain exceptions, generally requires a telephone corporation to obtain a certificate of public convenience and necessity from this Commission before constructing facilities in a new or expanded

service territory. The federal regulatory scheme, on the other hand, contemplates that the FCC will grant licenses to CMRS carriers, subject to state or local siting requirements.

We believe, as we have stated in earlier decisions, that the public interest will be served by the rapid development of competition in the CMRS field. Accordingly, we find that the public convenience and necessity will require the construction of the facilities that will be used to provide the service that the FCC has authorized, so long as any local siting requirements have been satisfied. Based on this finding, the issuance of a CPCN, where required by section 1001, becomes a ministerial act. Accordingly, we will direct the Executive Director, or his delegee, to promptly issue a CPCN to any CMRS provider that has an FCC license and that has made the informational filing described below stating that it has obtained any required local authorization. However, this ministerial CPCN is necessary only where required by section 1001. In those circumstances where section 1001 does not require a CPCN, the CMRS provider simply has to make the informational filing described below and need not request the issuance of a ministerial CPCN.

We are currently reviewing the policy of regulating the siting of cellular facilities in R.90-01-012, including reconsideration of the relationship between the Commission and local permitting agencies. In that proceeding, the Commission Advisory and Compliance Division (CACD), Safety and Enforcement Division (S&E), the cellular carriers, and other interested parties are working together to develop modifications to GO 159, which addresses the siting and environmental review of cellular utility facilities.

The ultimate disposition of the proposed revisions to GO 159 is a matter to be resolved in R.90-01-012. We do not intend to prejudge that proceeding here. As a policy matter, however, we agree that the local jurisdictions should have the primary role in

facility siting and environmental review, and that the Commission should avoid needless duplication of local review. We also concur with AirTouch that extending the scope of GO 159 to include all CMRS providers has merit and promotes the general goal of leveling the playing field among competing CMRS. Accordingly, parties to this proceeding (except for those RTUs no longer subject to our jurisdiction as of January 1, 1996, under amended PU Code § 234) are placed on notice that they should file an appearance in R.90-01-012 to preserve their rights to be heard on siting issues.

Because of the pendency of R.90-01-012, a final disposition of CMRS siting procedures cannot be made at this time. Until a decision is issued in R.90-01-012, cellular carriers will continue to follow the provisions of the currently adopted version of GO 159.

Since noncellular CMRS providers are not presently subject to GO 159, we will establish certain interim procedures to administer noncellular CMRS siting matters until a decision is issued in R.90-01-012. Noncellular CMRS providers are directed to make an informational filing with the Commission's S&E Division containing information regarding site location, Call Sign, and frequency and stating that they have obtained any local authorization that may be required for construction, removal, or significant modification of each site.[9] This filing shall be made within 15 days after obtaining all required local approvals, if any. We shall, however, keep our options open to assert our jurisdiction over facilities siting where specifically requested to do so by an interested party, or where siting conflicts arise at the local jurisdiction level.

9 We note that effective January 1, 1996, this requirement will no longer apply to those paging services that will be removed from our jurisdiction by Chapter 357, 1995 statutes.

Findings of Fact

1. The Budget Act signed into law on August 10, 1993 generally removed state rate regulation for all Commercial Mobile Radio Service (CMRS) providers effective August 10, 1994, but left in place the states' authority to regulate other "terms and conditions" of service.

2. The Budget Act also preempted states from regulating entry of all CMRS providers.

3. On August 8, 1994, the Commission filed a petition with the FCC (Petition) to continue its rate jurisdiction over cellular carriers for an 18-month period.

4. The Commission's Petition did not request authority to retain rate jurisdiction over noncellular CMRS providers.

5. The FCC released its Report and Order on May 19, 1995 Denying the Petition of the People of the State of California to Retain Authority to Regulate Intrastate Cellular Service Rates.

6. The California Public Utilities Commission issued a news release on June 8, 1995 stating its intention not to appeal the FCC denial.

7. The Cellular Resellers Association (CRA) filed for reconsideration of the FCC denial of the Commission's Petition, on June 22, 1995.

8. On August 8, 1995, the FCC denied the CRA petition for reconsideration.

9. The federal preemption of rate and entry regulation now applies to all CMRS providers.

10. By D.87-10-035 (25 CPUC2d 459, 462), both cellular resellers and RTUs have been exempted from the financing approval requirements of Article 5 and from the transfer and encumbrance approval requirements of Section 851 of the PU Code when such transfers or encumbrances serve to secure debt.

11. In R.90-01-012, the Commission Advisory and Compliance Division, the Commission's Safety and Enforcement Division, the

cellular carriers, and other interested parties are working together to propose modifications to GO 159, which addresses the siting and environmental review of cellular utility facilities.

Conclusions of Law

1. Prior to the enactment of the Federal Budget Act, this Commission had jurisdiction to regulate the rates as well as other terms and conditions of service for CMRS providers.

2. Pursuant to recent legislation (Chapter 357, 1995 statutes), this Commission will no longer have jurisdiction over one-way paging service utilizing FCC-licensed facilities (including narrow-band PCS described in 47 CFR, Part 24, Subpart D), beginning January 1, 1996.

3. The Budget Act reclassified certain PMRS providers to CMRS status if they provide interconnected mobile service to the public for profit. The Budget Act, however, establishes a three-year transition period, ending August 10, 1996, before any private land mobile service provided before August 10, 1993 becomes subject to federal or state regulation as a CMRS service.

4. In accordance with the Federal Budget Act, this Commission asserts regulatory authority over Nextel beginning August 10, 1996, since Nextel was providing private land mobile service prior to the enactment of the Budget Act.

5. Those carriers providing or intending to provide wireless communications services as PCS providers are generally not entitled to the three-year transition period and are subject to state jurisdiction as CMRS carriers including the siting requirements prescribed in this order applicable to noncellular CMRS providers.

6. Pursuant to article 3, section 3.5 of the California Constitution, this Commission cannot declare any California statute unenforceable due to federal preemption. The Commission may declare that a state statute is not preempted by federal law, or may declare that requirements imposed only by Commission decision

15. Even though the Commission's jurisdiction over security issuances, transfers of ownership, and transfers and encumbrances of utility property is not preempted, the Commission should forbear from exercising such authority with respect to any relevant transactions under §§ 816-839 and 851-856 involving CMRS carriers except under the conditions prescribed in Ordering Paragraph (O.P.) 3 below.

16. Our forbearance of preapproval of transactions involving issuances of securities, transfers of ownership, and asset transfer or encumbrance is appropriate and should promote a more competitive marketplace.

17. Subject to the exceptions contained in O.P. 3 below, CMRS providers should be exempt from the provisions of Article 5 of Chapter 4 of the Public Utilities Code in order to further streamline regulation and promote competition and because the application of these provisions to CMRS providers is not necessary in the public interest.

18. Subject to the exceptions contained in O.P. 3 below, CMRS providers should be exempt from the provisions of Article 6 of Chapter 4 of the Public Utilities Code in order to further streamline regulation and promote competition and because the application of these provisions to CMRS providers is not necessary in the public interest.

19. Preemption of entry regulation does not eliminate this Commission's jurisdiction over CMRS siting.

20. State or local environmental review and approval of siting of CMRS facilities additions coincident with a CMRS provider's entry or expansion into a new market area does not constitute regulation of entry.

21. The issue of facilities siting involves the question of where and how facilities should be located, not whether a CMRS provider should be allowed into a given market. The House Report

specifically mentions "facilities siting issues" as a term and condition that is not preempted by the Budget Act.

22. It is reasonable to prescribe interim information reporting requirements for siting pending the resolution of R.90-01-012.

23. Noncellular CMRS carriers should make an informational filing promptly after requisite siting approvals have been obtained from the relevant local jurisdiction.

24. Cellular CMRS providers should continue to be subject to existing GO 159 requirements until further disposition in R.90-01-012.

25. Filing and reporting requirements for facilities siting for CMRS carriers should be addressed in R.90-01-012, concerning proposed modifications to GO 159.

26. The public interest will be served by the rapid development of competition in the CMRS field. Therefore, the public convenience and necessity will require the construction of the facilities that will be used to provide the service that the FCC has authorized, so long as any local siting requirements have been satisfied.

27. Where CMRS facilities require a CPCN pursuant to section 1001, CMRS providers should request the issuance of a ministerial CMPN at the time they make their informational siting filing.

O R D E R

IT IS ORDERED that:

1. All CMRS carriers shall continue to comply with the Wireless Identification Registration procedures previously established in D.94-10-031, including notification of change of ownership.

2. Any CMRS provider that does not have a Commission-issued CPCN for market entry may obtain one by filing with this Commission

(and not mandated by statute) are unenforceable due to federal preemption.

7. The public interest will be served by the rapid development of competition in the CMRS field. Therefore, the public convenience and necessity will require market entry of all CMRS providers licensed by the FCC.

8. Any FCC-licensed CMRS provider that does not have a Commission-issued CPCN for market entry should request the issuance of a ministerial CPCN at the time it makes its initial Wireless Registration Identification filing.

9. The transfer of ownership interests in a CMRS entity is not tantamount to entry, and Commission jurisdiction over such transfers is not preempted under the federal legislation.

10. Federal preemption of entry regulation does not preempt state regulation of transactions involving issuance of securities or transfers or encumbrances of assets.

11. Regulation of securities transactions under Article 5 of the PU Code does not constitute regulation of market entry, but relates to the terms and conditions by which utility property will be financed.

12. Asset transfer or encumbrance transactions or transfers of control falling within the scope of §§ 851-854 do not constitute market entry.

13. Section 829 of the PU Code provides the Commission the discretion to exempt any public utility or class of utilities from the provisions of Article 5 of Chapter 4 if it finds the application thereof to such utilities is not necessary in the public interest.

14. Section 853 of the PU Code provides the Commission the discretion to exempt any public utility or class of utilities from the provisions of Article 6 of Chapter 4 if it finds the application thereof to such utilities is not necessary in the public interest.

a wireless Identification Registration, and in the case of a facilities-based provider, a copy of its FCC license. The Executive Director, or the Director's delegee, promptly upon receiving these items shall issue a CPCN to the CMRS provider, when so requested by the provider.

3. All CMRS providers are hereby exempted from compliance with the provisions of Public Utilities (PU) Code §§ 816-830 regarding the issuance of securities and §§ 851-856 relating to transfers of ownership and transfer or encumbrance of CMRS assets, except that CMRS providers shall provide the following advance notice by personal service to the Director of the Commission Advisory and Compliance Division (CACD) of these specific transactions:

a. In any proposed transaction involving the financing of a CMRS affiliate by a facilities-based local exchange carrier (LEC) or facilities-based interexchange (IEC) or their affiliates, 14 days prior notice.

b. In any proposed transaction involving an ownership interest in a CMRS entity being acquired by a facilities-based LEC or facilities-based IEC or their affiliates, 30 days prior notice.

c. In any proposed transaction involving any change in ownership of the CMRS provider in which an owner or group of owners acquire a larger ownership share than the largest holding of any current owner, 30 days prior notice.

Unless the CMRS provider is notified within the 14 or 30 day period by the Commission or its staff that further information is needed or that a formal application is required, the CMRS provider shall not require any commission preapproval to consummate the transaction.

4. The notice periods for transactions described in O.P. 3, subparts a, b, or c, which had been proposed during the pendency of

this proceeding, shall begin to run from the effective date of this decision.

5. Except for transactions described in subparts a, b, or c of O.P. 3, all pending applications by CMRS carriers for Commission authorization of transactions covered by PU Code §§ 816-830 or 851-856 shall be identified and dismissed by separate order. They shall be treated as Wireless Identification filings.

6. Until the issuance of a decision in Rulemaking (R.) 90-01-012, CMRS carriers shall be subject only to the following requirements for siting:

a. Cellular carriers shall remain subject to the existing requirements of the existing version of General Order (GO) 159 until a decision in R.90-01-012 is issued.

b. Noncellular CMRS providers shall provide to the Commission Safety & Enforcement Division within 15 days of receiving local government siting approval a report describing new facilities added to their system, as part of the Wireless Identification Registration. The format of the report shall at a minimum include site locations, Call Sign, and frequency and state that any required local authorization has been obtained.

c. Any noncellular CMRS provider that is required by PU Code § 1001 to obtain a certificate of public convenience and necessity (CPCN) for siting new facilities may obtain one by requesting it at the time it files the report described in subparagraph b, above. The CMRS provider shall also provide the Commission with a copy of it FCC license, if a copy is not already on file with the Commission. The Executive Director, or the Director's delegee, promptly upon receiving the report described in subparagraph b (together with any required copy of the FCC license) shall issue a CPCN for the facilities involved, when so requested by the provider.

7. While this Commission retains jurisdiction over CMRS siting and until the issuance of a decision in R.90-01-012, CMRS providers need not file a formal application or advice letter for CMRS siting, but shall instead comply with the requirements of the preceding ordering paragraph.

8. Any further revisions in the requirements with respect to facilities siting applicable to cellular carriers or other CMRS carriers shall be addressed in R.90-01-012.

9. If there are any pending applications for CPCNs for CMRS siting authority, the Executive Director shall grant a ministerial CPCN, pursuant to O.P. 6.c, where it appears that a CPCN is required by PU Code § 1001 and where the requirements of O.P. 6.c have been met. A separate order shall be prepared for Commission action identifying and dismissing any other pending CMRS applications for CPCN siting authority and treating them as Wireless Identification filings.

10. The June 19th motion filed by Pacific Bell Mobile Services and Pacific Telesis Mobile Services for an order that any Commission approvals for its PSC network are preempted by federal law is denied.

11. One-way paging services that use facilities licensed by the FCC (including narrow-band PCS described in 47 CFR, Part 24, Subpart D) shall be subject to the requirements of this decision until January 1, 1996, after which time they will be exempt from Commission regulation and the requirements of this decision.

12. Within 60 calendar days following the effective date of this order, personal communications service (PCS) providers, as providers of commercial mobile radio service (CMRS), shall comply with the applicable regulations as set forth in the provisions of these ordering paragraphs. This ordering paragraph shall not apply to:

a. one-way paging services exempted from Commission regulation pursuant to Chapter 357, Statutes of 1995;

b. any PCS carrier which believes that due to its particular circumstances, it is eligible for the three-year transition period.

Any PCS carrier believing it qualifies for the three-year transition period must file a pleading justifying this status within 60 days of the effective date of this order.

13. Nextel and any similarly situated SMR provider that was providing private land mobile service before the date of enactment of the Budget Act, are not subject to regulation as CMRS providers under the preceding ordering paragraphs at this time, but, beginning August 10, 1996, shall comply with the California regulatory requirements then in effect for CMRS providers.

This order is effective today.

Dated October 18, 1995, at San Francisco, California.

DANIEL Wm. FESSLER
President
P. GREGORY CONLON
HENRY M. DUQUE
JOSIAH L. NEEPER
Commissioners

I will file a written dissent.

/s/ JESSIE J. KNIGHT, JR.

A written concurrence by Daniel Wm. Fessler is attached.

COMMISSIONER JESSIE J. KNIGHT, JR., DISSENTING:

Federal preemption of state rate and entry regulation is explicit and absolute. It leaves no room for state regulation of rates or entry of Commercial Mobile Radio Service (CMRS) providers. I believe that Article 3, §3.5 of the California Constitution runs counter to the supremacy clause of the United States Constitution. I find that this decision's treatment of Article 3, §3.5 requires that I act in a manner that is fundamentally at odds with the oath of office I took when I became a Commissioner, wherein I swore to "bear true faith of allegiance to the Constitution of the United States and to the Constitution of the State of California."

The interpretation of Article 3, §3.5 advanced in this decision would, in my opinion, require my fellow Commissioners and I, as state officials, to ignore federal law where that law preempts state authority. This Commission did not challenge this federal preemption. While we petitioned the Federal Communications Commission (FCC) not to preempt our regulation of cellular providers, we **did not** challenge the FCC's right to do so, if it so chose. The Commission did not seek rehearing of the FCC order that resulted in the preemption of California's rate and entry regulation.

It is unclear to me that CMRS providers are required to have a certificate of public convenience and necessity (CPCN) from this Commission prior to beginning to offer service in this area. Carriers could offer service under federal authority. I foresee that under this decision, we will be forced to take action to attempt to have them cease operation because they do not have a state CPCN. Carriers will continue operations and assert their right under federal law to enter the market. The issue ultimately will be settled in court, where the Commission will, in my judgement, lose the case because the Commission itself does not believe that the federal preemption is invalid. The result is that we are asking carriers to comply with regulations they are under no obligation to obey. Article 3, §3.5 does not require carriers to await an appellate court order before they can conduct their business in accordance with the prevailing federal law, even where that behavior is counter to existing state statute.

I also disagree with the decision because it fails to address §202 of the Public Utilities Code, and that section's applicability in this matter. §202 states that "neither this part nor any provision thereof, except where specifically so stated...shall apply to interstate commerce, except insofar as such application is permitted under the Constitution and the laws of the United States." This Commission has not argued that Congress overstepped its bounds to regulate interstate commerce with respect to its preemption of state rate and entry regulation of CMRS providers. As the Commission found in D.82-12-114, Public Utilities Code §202 does not require that state regulations be directly applicable to interstate commerce among the several states. It only requires that the regulations "apply" to interstate commerce in some manner. Complying with §202, to legitimately refrain from applying state statutes to interstate commerce, does not run afoul of Article 3, §3.5 of the California Constitution.

This Commission has not argued that the federal law and the FCC's application of it to

preempt state entry and rate regulation have overstepped the legitimate authority of the federal government to regulate interstate commerce. This Commission has, in fact, conceded that this preemption of state regulation is lawful.

Even without the provisions of §202 of the Public Utilities Code, I believe that the decision errs in having this Commission continue to enforce state statutes that we admit were legitimately preempted. In the face of conflicting and directly contradictory mandates between federal and state statutes, I believe we, just as our predecessors did in the 1982 Grey hound case cited above, must defer to the supreme law of the land, under the Supremacy Clause of the United States Constitution.

I am deeply troubled that the legal analysis in this decision will tie the Commission's hand in effectively administering state law, including §202 of the Public Utilities Code. I am particularly troubled by the impact this may have with our efforts to rationalize our remaining areas of regulation with CMRS providers in further decisions in this case.

/s/ Jessie J. Knight Jr.
Jessie J. Knight, Jr.
Commissioner

October 18, 1995

I.93-12-007
D.95-10-032

FESSLER, PRESIDENT OF THE COMMISSION, CONCURRING:

I fully support the majority opinion in this proceeding and nothing in the thoughts I now express departs from the views I asserted at our recent conference. I write briefly to address the dissenting views of my colleague, COMMISSIONER KNIGHT. I was first exposed to his thesis in the course of our oral discussion which preceded our vote on this important matter. I found it troubling. Having now had an opportunity to study its written expression, I find it disturbing. Though doubtless asserted with the best of intentions, the notion that this Commission can interpret the actions of the People of California in amending our Constitution as running afoul of the supremacy clause of the Constitution of the United States, is a dangerous assertion of unbridled and apparently not to be accounted for power. Nothing in the nature of this agency or in the powers or duties of the office with which Commissioner Knight and I have been temporarily entrusted, warrants such a usurpation of powers which the people of this state have plainly vested in California's appellate judiciary.

Since the dispute is over the import of our state's constitution, let us begin by referencing both its text and history. The text speaks for itself, and I will rely upon the words of the Supreme Court of California for the history. In pertinent part, Article III, section 3.5 of the California Constitution declares:

> An administrative agency, *including an administrative agency created by the Constitution or an initiative statute*, has no power:
>
> a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of its being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;
>
> b) To declare a statute unconstitutional;
>
> c) *To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal legislation.* (Emphasis added).

It would be impossible to square the command of this constitutional mandate

with the course of conduct suggested by COMMISSIONER KNIGHT. Indeed, to reach his suggested conclusion the Commission would have to find this provision of California's Constitution to be "unconstitutional." The affront to the express will of the California electorate, as well as its elected representatives, could hardly be more profound.

Were the Commission to follow the suggestions contained in the dissent it would reprise a history succinctly reviewed by the California Supreme Court.

> Article III, section 3.5, which was enacted by the voters in 1978, was placed on the ballot by a unanimous vote of the Legislature in apparent response to this court's decision in *Southern Pac. Transportation Co. v. Public Utilities Commission*, (1976) 18 Cal.3d 308, in which the majority held that the Public Utilities Commission had the power to declare a state statute unconstitutional. . . .The purpose of the amendment was to prevent agencies from using their own interpretation of the Constitution or federal law to thwart the mandates of the Legislature. . . .

Reese v. Kizer, 46 Cal.3d 996, 1002 (1988). It would be impossible to read *Reese* for the hint of a suggestion that the Court understood the people to have limited their expression on the allocation of power in our government to a Commission declaration asserted on grounds of the *state* constitution while leaving Commissioners free to exercise their judgment of nullification predicated on their interpretation of the *federal* constitution. Yet that is precisely the strategy suggested in my colleague's dissent.

At the bottom of this debate is a basic civics lesson, and it would be difficult to improve upon the considered observations of Justice Stanley Mosk:

> . . .Absent authorization in the state charter itself, such formidable action [to declare a duly enacted statute unconstitutional] is beyond the power of any administrative agency. Indeed, it is incongruous for the will of the people of the state, reflected by their elected legislators, to be thwarted by a governmental body which exists only to implement that will.

Southern Pac. Transportation Co. v. Public Utilities Com., 18 Cal.3d 308, 315 (1976). In his partial concurring and dissenting opinion Justice Mosk went on to confront the explicit premise in the Knight opinion that an appeal to the Constitution of the United States could ground a decision by an administrative agency to nullify a state statute.

> The United States Supreme Court, on at least three occasions, has considered whether an administrative agency has the power to declare a statute unconstitutional. In each instance, the high court has concluded, as in *Davis Warehouse Co. v. Bowles* (1944) 321 U.S. 144. . . ., that 'State statutes, like federal ones, are entitled to the presumption of constitutionality until their invalidity is judicially declared. . . .'

Id., at 316. It must be emphasized that Justice Mosk and the *Davis* decision were seeking to preserve the presumptive validity of state statutes in the face of constitutional doubt. Commissioner Knight would escalate the debate to a claimed ability of an administrative agency, itself a creature of the California Constitution, to overturn a provision of that same Constitution. The offense would sweep beyond an affront to the people's elected representatives, to repudiate the citizens of California themselves.

In the final analysis there is utterly no reason to suggest that our majority opinion places the State of California on a collision course with an assertion of federal supremacy. This point has been posed and totally rejected by the United States Court of Appeals for the Ninth Circuit.

> . . .Article III, § 3.5 merely 'places restraints on administrative agencies relative to their refusal to enforce statutes on constitutional grounds; it does not affect their enforcement of their own rules or their competence to examine evidence before them in light of constitutional standards.' (citing an earlier Ninth Circuit case).

Dash, Inc. v. Alcoholic Beverage Control Appeals Board, 683 F.2d 1229 (1982). What the people of California have done is to place the decision, insofar as it is entrusted to the government of California, in the hands of the appellate judiciary. While I personally share Commissioner Knight's conviction that provisions of recently enacted federal law preempt the state regulation of rates or entry for certain

providers of wireless telephony, I am prepared to acknowledge that the judgment of nullification is not mine to make. The fundamental lesson of every civics class is that we live in a society with a government of limited power. At the core of that governmental scheme lies the rule of law and not of individuals. Today the Commission acted to bear true faith and allegiance to that fundamental proposition.

Dated October 18, 1995
San Francisco, CA

/s/ DANIEL Wm. FESSLER

Daniel Wm. Fessler
President